

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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GRAHAM GILLETTE,	:	EQCE072582
	:	
Petitioner,	:	
	:	
v.	:	
	:	<b>RULING ON RENEWED MOTION</b>
	:	<b>FOR <i>IN CAMERA</i> REVIEW</b>
TEREE CALDWELL-JOHNSON, CONNIE	:	
BOESEN, CINDY ELSBERND, BILL	:	
HOWARD, JOE JONGEWAARD, DICK	:	
MURPHY, PAT SWEENEY, All Members of	:	
the Board of the Des Moines Public Schools,	:	
	:	
Respondents.	:	

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This matter came before the Court on April 26, 2013, for hearing on the Petitioner's renewed motion for *in camera* review. Petitioner Graham Gillette ("Gillette") was represented by attorney Randall Wilson. Respondent members of the Board of the Des Moines Public Schools (collectively, "the Board") were represented by attorney Andrew Bracken. Having considered the testimony presented and arguments of counsel, reviewed the court file, and being otherwise fully advised in the premises, the Court makes the following ruling.

**I. FACTUAL AND PROCEDURAL HISTORY**

The Board is the governing body for the Des Moines Independent Community School District ("the School District") and is subject to the Official Meetings Open to Public law found in Iowa Code chapter 21. Dr. Nancy Sebring ("Dr. Sebring") was employed as the superintendent for the school district during the 2011–2012 school year. (Affidavit of Lantz, p. 2.) On April 3, 2012, Dr. Sebring announced that she accepted an offer to be the superintendent of the Omaha Public Schools beginning in the following school year, and tendered her resignation as superintendent effective June 30, 2012. (Affidavit of Lantz, p. 2.)

The School District received an open records request for documents relating to Dr. Sebring on May 7, 2012. (Affidavit of Lantz, p. 2.) The following day, Patricia Lantz (“Lantz”), the attorney for the School District, determined the documents requested may indicate a misuse of School District resources or other misconduct. (Affidavit of Lantz, pp. 2–3.) Lantz discussed these documents with members of the Board, who determined a meeting with the entire Board was needed. (Affidavit of Lantz, p. 3.) On May 9, 2012, the Board published a tentative meeting agenda providing the Board would meet in closed session on May 10, 2012. (Pet. Ex. 2, ¶ 4.)

After the tentative agenda was posted, Dr. Sebring tendered her immediate resignation to the Board. (Affidavit of Lantz, p. 4.) In the morning of May 10, 2012, Dr. Sebring requested the Board close the meeting pursuant to Iowa Code chapter 21. (Affidavit of Lantz, p. 4.)

The Board met on May 10, 2012, at 12:00 p.m., and unanimously voted to go into closed session under Iowa Code section 21.5(1)(i). (Pet. Ex. 4, p. 1.) The closed session lasted approximately sixty minutes. (Testimony of Gillette; Affidavit of Lantz, pp. 4–5.) During the closed session, the Board was briefed regarding the personnel matter and the documents discovered. (Affidavit of Lantz, p. 5.) The Board discussed discipline, and whether to discharge Dr. Sebring or accept her immediate resignation. (Affidavit of Lantz, p. 5.) The Board also discussed the appointment of a new superintendent. (Affidavit of Lantz, p. 5.)

After opening the meeting to the public, the Board unanimously voted to immediately accept the resignation of Dr. Sebring. (Pet. Ex. 4, p. 14.) The Board next unanimously voted to implement the emergency succession plan and appoint Associate Superintendent Tom Ahart as acting superintendent. (Pet. Ex. 4, pp. 14–15.)

A May 11, 2012 news article published by the Des Moines Register quoted a member of the Board as stating the resignation was “not a situation in which [Dr. Sebring] has been

dismissed, and we are not required to kick in any of the severance clauses,” and “[Dr. Sebring has] now come to the conclusion that there were some things that she needed to accomplish before she started at Omaha, and that’s what brought this [resignation] about.” (Pet. Ex. 1, p. 1.) The article provides that the Board member stated that, in the closed session, the Board did not “discuss Sebring’s performance. Sebring was not being appointed, hired, or fired. . . . the discussion was about Sebring’s decision to speed her departure, and who would be interim superintendent.” (Pet. Ex. 1, p. 2.) The Board member stated “the meeting was closed because [Sebring and Ahart] requested a private session” and that the Board member did not know if holding the meeting in public would have caused anyone harm. (Pet. Ex. 1, p. 2.)

On June 1<sup>st</sup>, the School District released a statement providing that the reason for Dr. Sebring’s resignation was the discovery of possible misuse of School District resources and possible misconduct. (Affidavit of Gillette, ¶ 9.) In a June 4<sup>th</sup> interview, the School District spokesperson stated that, even though Dr. Sebring’s resignation cited personal reasons for leaving, at least a couple of staff knew the documents requested would see the light of day and it would be clear what led up to Dr. Sebring’s resignation. (Affidavit of Gillette, ¶ 9.)

Gillette sued, alleging a violation of Iowa Code chapter 21, and requested discovery of the closed session minutes and tapes. On January 25, 2013, the Court ordered the parties to engage in discovery to support further application for an *in camera* review. To prepare for this hearing on Gillette’s renewed motion for an *in camera* review, the Board prepared an affidavit, and Gillette prepared an affidavit and exhibits.<sup>1</sup> Gillette also testified at the hearing.

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<sup>1</sup> The Court takes this opportunity to note the lack of evidence submitted by sworn affidavit or deposition from any member of the Board. This evidence would likely have been helpful to the Court and should not have been unduly burdensome to obtain, given the three months since the Court’s previous order. The Court reminds the parties that depositions in civil actions are available under Iowa Rule of Civil Procedure 1.701, and that “[t]he attendance of witnesses [at a deposition] may be compelled by subpoena as provided in rule 1.715.” IOWA R. CIV. P. 1.701(1)(b).

Gillette serves on public boards subject to the Official Meetings Open to Public law, and has served on the School District's Board in the past. (Affidavit of Gillette, ¶ 1.) Gillette asserts that the volume of redacted minutes from the closed session on May 10<sup>th</sup>, the length of time the session was closed, and the statements made by members of the Board each indicate a possible violation of Iowa Code chapter 21. (Affidavit of Gillette, ¶¶ 12–14.) Gillette requests the Court review, *in camera*, the closed meeting minutes under Iowa Code section 21.5(4).

## II. APPLICABLE LAW

Iowa's open meetings law is found in chapter 21 of the Iowa Code. Iowa Code section 21.3 provides:

Meetings of governmental bodies shall be preceded by public notice as provided in section 21.4 and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

IOWA CODE § 21.3 (2011).

1. A governmental body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting. *A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:*

....

i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

2. The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. *A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.*

3. Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session.

4. A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also audio record all of the closed session. The detailed minutes and audio recording of a closed session shall be sealed and shall not be public records open to public inspection. *However, upon order of the court in an action to enforce this chapter, the detailed minutes and audio recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding.* After such a determination, the court may permit inspection and use of all or portions of the detailed minutes and audio recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and audio recording of any closed session for a period of at least one year from the date of that meeting, except as otherwise required by law.

*Id.* § 21.5 (emphasis added).

Once a party seeking judicial enforcement of this chapter demonstrates to the court that the body in question is subject to the requirements of this chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this chapter.

*Id.* § 21.6(2).

A court may review *in camera* the tapes and transcripts of closed meetings to determine whether a governmental body strayed from the announced reason for closing the meeting. *See Tausz v. Clarion-Goldfield Comm. Sch. Dist.*, 569 N.W.2d 125, 127 (Iowa 1997); *Feller v. Scott Cty. Civil Serv. Com'n*, 482 N.W.2d 154, 158 (Iowa 1992); *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 815 (Iowa Ct. App. 1999). The balancing of interests between those who assert the transcripts should be made public, and those who assert the transcripts should remain closed, is to be made on a case-by-case basis to ensure governmental bodies do not use Iowa Code chapter 21 to close meetings which should otherwise be open to the public. *Tausz*, 569 N.W.2d at 128.

### **III. ANALYSIS**

Here, the Board's stated purpose of closing the May 10, 2012 meeting was "[t]o evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session." (Pet. Ex. 4, p. 1.) Following the meeting, a member of the Board stated to the press that Dr. Sebring resigned to take care of personal matters before beginning work with another school district. (Pet. Ex. 1, p.1.) The member further stated that the Board did not discuss Dr. Sebring's performance in the closed session, and that it was uncertain whether holding an open session instead of a closed session would have caused anyone harm. (Pet. Ex. 1, p. 2.)

Approximately three weeks later, the School District provided that Dr. Sebring resigned following the discovery of possible misuse of School District resources, and possible misconduct. (Affidavit of Gillette, ¶ 9.) A member of the Board also stated in an interview that certain individuals knew that documents demonstrating the misuse of resources and possible misconduct would be released, and that the documents would make clear the real reasons Dr. Sebring resigned. (Affidavit of Gillette, ¶ 9.)

These statements are inconsistent, and when considered with the whole of the evidence submitted, demonstrate a credible concern regarding the reason the Board held a closed session on May 10, 2012. If the stated purpose for holding a closed session is true, then a member of the Board may have made untrue statements to the press following the meeting. Conversely, if the statements made to the press are true, then the stated purpose for closing the meeting may be untrue, and may be an unlawful reason to close the session under Iowa Code section 21.5.

Finally, if the later statements to the media made by a member of the Board are truthful, and members of the Board understood that the documents in question would be released to the public, then it is uncertain whether the Board had the requisite belief that closing the session was necessary to protect the reputation of those discussed in the closed session.

In any event, Gillette has provided credible evidence which calls into question the scope of, and reasons for, the closed session held on May 10, 2012. Pursuant to Iowa Code section 21.5(4), the Court finds an *in camera* review of the minutes and transcript of the closed meeting is appropriate to determine whether the Board violated Iowa Code chapter 21.

#### **IV. ORDER**

IT IS HEREBY ORDERED that the Petitioner's renewed motion for *in camera* review is GRANTED.

The Board shall submit under seal to the undersigned the un-redacted minutes, transcript, and audio recording of the May 10, 2012 closed session of the Board of the Des Moines Public Schools by May 10, 2013.

DATED: April 30, 2013



**KAREN A. ROMANO, DISTRICT JUDGE**  
FIFTH JUDICIAL DISTRICT OF IOWA

Copies to:

Randall C. Wilson  
ACLU of Iowa Foundation  
901 Insurance Exchange Bldg.  
550 Fifth Avenue  
Des Moines, IA 50309  
Randall.Wilson@aclu-ia.org

Andrew J. Bracken  
AHLERS & COONEY, P.C.  
100 Court Avenue  
Suite 600  
Des Moines, IA 50309  
Fax: (515) 243-2149  
dbracken@ahlerslaw.com